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# Abortion Waiting-Period Statutes: Hartigan v. Zbaraz and Justice Anthony Kennedy's Impact on Future Decisions

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# NOTES AND COMMENTS

## ABORTION WAITING-PERIOD STATUTES: *HARTIGAN v. ZBARAZ* AND JUSTICE ANTHONY KENNEDY'S IMPACT ON FUTURE DECISIONS

### I. INTRODUCTION

In 1973, the Supreme Court held that the fundamental right of personal privacy[1] is broad enough to encompass a woman's decision to have an abortion.[2] Three years later, the Court extended the right to have an

1. Although the Constitution does not explicitly mention a right of privacy, the Supreme Court has recognized in varying contexts that there is a constitutionally protected right of privacy. As early as 1925, the Court held that a statute requiring children to attend public school was unconstitutional as impeding the "liberty of the parents" to control the rearing and education of their children. Pierce v. Society of Sisters, 268 U.S. 510, 519 (1925). In Griswold v. Connecticut, the majority found a "penumbra" of protection in the Bill of Rights and held that the right of married persons to use contraceptives was included in that penumbra. 381 U.S. 479, 484-85 (1965). Justice Goldberg concurred, but found the right of privacy in the ninth amendment. *Id.* at 486-87. The right of privacy was extended to single persons when the Court held in Eisenstadt v. Baird that the right of the "individual" to make decisions concerning child bearing should be protected from unwarranted government intrusion. 405 U.S. 438, 453 (1972). The right of privacy also includes "the individual interest in avoiding disclosure of personal matters" and the "interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (footnotes omitted).

2. Roe v. Wade, 410 U.S. 113, 154 (1973). "This right of privacy, . . .founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . .is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. But this right is not absolute, and there are areas in which some state regulation is appropriate. *Id.* at 154. However, the regulation must be justified by a "compelling state interest" and be so "narrowly drawn" that it fulfills only that legitimate interest. *Id.* at 155. The state has an important and legitimate interest in protecting the "potentiality of human life" which only becomes compelling at the point of viability of the fetus (when the fetus is capable of "meaningful life outside the mother's womb"). *Id.* at 162-63. At viability, the state may proscribe abortion altogether, except when necessary "to preserve the life or health of the mother." *Id.* at 163-64. The state also has an important and legitimate interest in protecting the health of the pregnant woman, but that interest does not become compelling until approximately the end of the first trimester. *Id.* at 162-63. Until that time, the state may not interfere with the decision of a woman and her physician to have an abortion. *Id.* at 164-66. *See also* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating as unduly burdensome those sections of abortion ordinance requiring parental consent, informed consent, 24-hour waiting period, and requiring that second trimester abortions be performed in a hospital). The Court stated that Roe v. Wade does not mean that a state may never regulate abortion in the early stages of pregnancy. *Id.* at 429-30. Regulations having no significant

abortion to unmarried women under the age of eighteen.[3] Although the right to procure an abortion is not unqualified,[4] the Supreme Court has generally upheld the right of a minor woman to obtain an abortion without unjustified interference by the state.[5] In a per curiam decision, the Court recently affirmed, in *Hartigan v. Zbaraz*,[6] the decision of the Seventh Circuit Court of Appeals which held unconstitutional a portion of an Illinois statute requiring that an unemancipated minor seeking an abortion wait twenty-four hours after her physician had notified the minor's parents of her decision.[7]

Although *Zbaraz* is important for its confirmation of minors' abortion rights, its greatest significance lies in the fact that an equally divided Supreme Court affirmed the court of appeals decision. The eight justices of *Zbaraz* have since been joined by Justice Anthony Kennedy,[8] and the impact of his appointment upon privacy and abortion issues is yet unclear. However, an analysis of Kennedy's judicial philosophies and relevant Ninth Circuit opinions in conjunction with *Hartigan v. Zbaraz* may lead to the conclusion that Justice Kennedy would join the four dissenters of *Zbaraz* and hold that the twenty-four hour waiting period imposed by the Illinois Parental Notice of Abortion Act of 1983 is constitutional.

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impact on a woman's abortion right may be upheld so long as they further a state's important health-related concern and do not interfere with the woman's decision to have an abortion. *Id.* at 430.

3. Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976).

4. *Wade*, 410 U.S. at 154.

5. *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 491-92 (1983) (A state's interest in protecting immature minors will sustain a parental consent requirement so long as there are alternative procedures); *Akron*, 462 U.S. 416, 439-40, 450-51 (1983) (A statute must provide a procedure by which a minor can avoid a parental veto of her abortion decision; also, a state may not require a woman to wait 24 hours to obtain an abortion after she has made an informed decision to have one.); Bellotti v. Baird, 443 U.S. 622, 643 (1979) [hereinafter *Bellotti II*] (If a state requires parental consent, it must also provide alternative procedures for obtaining authorization.); *Danforth*, 428 U.S. at 74 (A state may not impose a blanket provision requiring consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of pregnancy.). *But cf.* H.L. v. Matheson, 450 U.S. 398 (1981) (upholding statute requiring parental notification of immature, dependent minor).

6. 108 S. Ct. 479 (1987), *aff'g per curiam*, 763 F.2d 1532 (7th Cir. 1985).

7. Zbaraz v. Hartigan, 763 F.2d 1532, 1545 (7th Cir. 1985), *aff'd per curiam*, 108 S. Ct. 479 (1987).

8. Confirmed February 3, 1988, by a 97-0 vote of the United States Senate. *Senate Approves Anthony Kennedy for High Court*, L.A. Daily J., Feb. 4, 1988 at 1, col. 6.

## II. STATEMENT OF *Zbaraz*

### A. *Facts*

The Illinois Parental Notice of Abortion Act of 1983 (the Act)[9] regulated the performance of an abortion on an unemancipated minor[10] by requiring that the girl's physician give actual notice[11] to both of her parents twenty-four hours before an abortion could be performed upon her.[12] The waiting period was not required if the parents or guardian had already been notified, and either accompanied the minor to the abortion facility or submitted signed, notarized statements indicating that they had been notified of the abortion decision.[13]

The Act also provided for a judicial alternative to parental notification if the minor objected to such notice being given.[14] The minor, on her own behalf or by next friend, could petition the court for a hearing and waiver of the notice requirement. If the court found either that the minor was "mature and well-informed enough" to make her own decision, or that parental notice would not be in her "best interests," the court was compelled to waive parental notification.[15] The Act required that the court rule within forty-eight hours of the application and maintain a confidential record of the proceedings.[16] Furthermore, the Act made available to the minor an opportunity to appeal an adverse ruling.[17]

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9. ILL. REV. STAT. ch. 38, ¶ 81-61 to 81-70 (1983).

10. "Minors" are defined as "any person under the age of 18." *Id.* ¶ 81-63(a). Emancipated minor is defined as "any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents." *Id.* ¶ 81-63(b). The Act also applied to "incompetents." *Id.* ¶ 81-64.

11. "Actual" notice is defined as "giving of notice directly, in person or by telephone." *Id.* ¶ 81-63(c). Notice could be waived if, in the best judgment of the physician, a medical emergency required an immediate abortion. *Id.* ¶81-66. Exceptions were also made for minors with divorced or non-available parents or guardians. *Id.* at ¶ 81-64(b). Furthermore, notice to the minor's father was not required if her mother accompanied her and orally stated that she reasonably believed that the fetus to be aborted was the child of the minor's father. *Id.* ¶ 81-67(b).

12. The Act states that:

> No person shall perform an abortion upon an unemancipated minor. . . unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman. . . of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician . . . certifying that the . . . physician or his agent has given such notice.

*Id.* ¶ 81-64(a).

13. *Id.* ¶ 81-67(a).

14. *Id.* ¶ 81-64(c).

15. *Id.* ¶ 81-65(d).

16. *Id.* ¶ 81-65(c).

17. *Id.* ¶ 81-65(f).

Before the effective date of the Act, plaintiffs[18] filed a class action suit in the United States District Court for the Northern District of Illinois challenging the Act's constitutionality. The district court immediately issued a temporary restraining order pending resolution of the issues.[19] Four months later, the district court issued a memorandum opinion declaring the twenty-four hour waiting period unconstitutional as imposing an unjustifiable burden upon the effectuation of the minor's abortion decision.[20] The court found that the requirement increased the cost of the procedure and could potentially result in a delay of more than twenty-four hours because of the necessity of scheduling and making two trips to the abortion facility.[21] The district court also held that the judicial alternative to parental notification was invalid because of its failure to assure confidential and expeditious appellate proceedings for waiver of the parental notice requirement.[22]

Rather than severing the invalid provisions of the Act,[23] the court granted plaintiffs' motion for summary judgment and permanently enjoined enforcement of the entire Act.[24] Defendants appealed to the United States Court of Appeals for the Seventh Circuit.

### B. *Issues*

On appeal,[25] the Seventh Circuit addressed the issue of whether the twenty-four hour waiting period was an unconstitutional burden on the right of a minor to have an abortion. The court also considered the constitutionality of the judicial alternative to parental notice in terms of whether it assured a minor an expeditious and confidential waiver proceeding.[26]

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18. The plaintiff class consisted of Drs. Allen G. Charles and David Zbaraz, representing themselves and all licensed physicians currently performing or desiring to perform abortions for unemancipated minors or disabled persons in Illinois, and on behalf of unemancipated minors capable of giving informed consent to an abortion or whose best interest would not be served by giving notice to both parents. The defendant class consisted of all State's Attorneys of all counties in Illinois. Zbaraz v. Hartigan, 584 F. Supp. 1452, 1454 (N.D. Ill. 1984), *order aff'd and vacated in part*, 763 F.2d 1532 (7th Cir. 1985), *aff'd per curiam*, 108 S. Ct. 479 (1987).

19. *Id.*

20. *Id.* at 1459.

21. *Id.* at 1458.

22. *Id.* at 1460-62.

23. The court concluded that the invalidity of the two basic provisions of the Act left "little remaining to sever which would have any operative significance." *Id.* at 1464.

24. *Id.* at 1467.

25. Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), *aff'd per curiam*, 108 S. Ct. 479 (1987).

26. The court also addressed the issue of severability and held that the constitutionally offensive provisions pertaining to the waiting period could be severed from the Act without destroying its

## III. LAW PRIOR TO *Zbaraz*

### A. *Parental Consent Statutes*

In *Planned Parenthood v. Danforth*,[27] the Supreme Court extended the right of privacy to encompass a minor girl's decision to terminate a pregnancy free from state interference.[28] In so doing, the Court struck a portion of a Missouri statute[29] requiring parental consent of an unmarried woman under the age of eighteen who sought an abortion during the first twelve weeks of her pregnancy.[30]

Because the state has historically had greater latitude in regulating the activities of children than of adults,[31] the Court applied a less stringent level of scrutiny than the compelling state interest test used in *Roe v. Wade*.[32] Nevertheless, the Court rejected the argument that the state's interest in safeguarding the family unit and parental authority was significant enough to condition an abortion on the consent of a parent or person *in loco parentis*.[33] The Court stated that the minor's right of privacy

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essential purpose. *Id.* at 1545. The court, therefore, vacated the district court's holding that the entire Act was unconstitutional. *Id.*

27. 428 U.S. 52 (1976).

28. *Id.* at 74. The Court also struck a provision requiring spousal consent prior to an abortion and upheld a provision requiring informed and freely given written consent by the pregnant woman. *Id.* at 67-69.

29. Mo. H. Bill No. 1211 § 3(4) (1974).

30. *Danforth*, 428 U.S. at 74. "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision" to terminate a pregnancy, and therefore may not impose a blanket provision requiring parental consent as a condition to obtaining an abortion. *Id.* This was the same rationale the Court used in striking down a spousal consent provision of the same statute. *Id.* at 69.

31. *Id.* at 74-75 (citing Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (upholding state child-labor statute over exercise of parental guardian control)). *See also* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding conviction for selling pornography to a minor over first amendment claims).

32. 410 U.S. 113 (1973). The *Danforth* Court looked to see if there was any "significant" state interest to support the parental consent requirement. *Danforth*, 428 U.S. at 75. *See also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (statute prohibiting the sale of contraceptives to minors held unconstitutional). Justice Brennan, writing for the majority in *Carey*, described the significant state interest test, stating:

> This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults. Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children and because the right of privacy implicated here is 'the interest in independence in making certain kinds of important decisions,' and the law has generally regarded minors as having a lesser capability for making important decisions.

*Carey*, 431 U.S. at 693 n.15 (citations omitted).

33. *Danforth*, 428 U.S. at 74. Providing a parent with absolute veto power is not likely to strengthen the family, nor is it likely to enhance parental authority when the nonconsenting parent and the pregnant minor are already in conflict over the abortion decision. *Id.* at 75. However, Justice Stevens stated that the state's interest in protecting the welfare of minors justifies the imposition of restraints upon a minor's freedom that would be impermissible if applied to an adult, and a

is greater than whatever interest the parents may have in the termination of their daughter's pregnancy.[34]

Although the Court reaffirmed *Roe v. Wade* and extended privacy protection to minors seeking abortions, it cautioned that its holding did "not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[35] Thus, the Supreme Court acknowledged that limitations on a minor's right to obtain an abortion may exist, but it failed to implement a standard by which a minor's consent would be deemed effective.

Three years after *Danforth* the Supreme Court, in *Bellotti v. Baird*[36] (*Bellotti II*), attempted to reconcile a woman's constitutional right of privacy in making an abortion decision with the special interests of the state in protecting minors.[37] A plurality of the Court held that a state may validly restrict a minor's access to abortion, but if it chooses to do so by requiring that she obtain parental consent, the state must also provide an alternative procedure by which she may obtain authorization and avoid the undue burden of a third-party veto.[38] In addition, the Court held that the minor must have the opportunity to obtain judicial authorization without first notifying her parents,[39] and the judicial proceedings must be conducted anonymously and expeditiously.[40]

If the pregnant minor successfully demonstrates to a court that she is "mature and well enough informed" to make an intelligent decision on her own, or if the court determines that she is immature but that an abortion would be in her "best interest," the court must authorize the

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parental consent requirement furthers that interest by maximizing the possibility that the decision to have an abortion is "made correctly and with full understanding of the consequences of either alternative." *Id.* at 102-03 (Stevens, J., concurring in part, dissenting in part).

34. *Id.* at 75.

35. *Id.*

36. 443 U.S. 622 (1979).

37. The Court acknowledged three reasons for not equating the constitutional rights of a child with those of an adult. *Id.* at 634. First is the minor's peculiar vulnerability. *Id.* While constitutional guarantees protect minors as well as adults from government deprivation, the state may adjust its legal system to account for the special needs of the minor. *Id.* at 635. Second is the child's inability to make informed decisions about important or critical matters, usually due to a lack of experience or judgment. *Id.* Therefore, the state may validly restrict the minor's freedom of choice if the matter has potentially serious consequences. *Id.* Third is the recognized right of parents to direct the upbringing of their children. *Id.* at 637. Therefore, the state may impose upon minors legal restrictions that are supportive of the parental role, such as requiring parental consent for certain important decisions. *Id.* at 638-39.

38. *Id.* at 643.

39. *Id.* at 647.

40. *Id.* at 644.

procedure without requiring that she consult with her parents.[41] If, however, the court finds otherwise, it may decline to authorize an abortion.[42] Thus, the *Bellotti II* Court protected a minor's constitutional right to choose, with her physician, whether to terminate her pregnancy, while also protecting the state's important interest in encouraging parental consultation for immature minors and those whose best interests do not justify an abortion. Once again, however, the Court failed to provide a standard by which the minor's maturity or best interests may be assessed.

### B. *Parental Notice Statutes*

The Court seemed to retreat from protecting a minor's right of privacy when it upheld, in *H.L. v. Matheson*,[43] a statute requiring that a physician notify, if possible, the parents of a dependent minor prior to performing an abortion.[44] A divided Court held that the notification requirement satisfied the important state interests of preserving family integrity[45] and protecting minors, while providing an opportunity for parents to provide the physician with pertinent medical and psychological histories of the minor.[46] The Court ruled that it did not need to determine the circumstances in which a state must provide an alternative to parental notification.[47] Although the Court acknowledged that the notice requirement may inhibit some minors from seeking an abortion, it ruled that "[t]he Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions."[48] The state is also not compelled to impose a waiting period to facilitate parental consultation after notification.[49]

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41. *Id.* at 647-48.

42. *Id.* at 648.

43. 450 U.S. 398 (1981).

44. *Id.* at 413. The issue originally before the Court was whether the statute was unconstitutional on its face as overbroadly applying to all unmarried minor girls, including those who were emancipated and mature. *Id.* at 405. The Court refused to address the broad question and narrowed the issue by ruling that the plaintiff, as a dependent minor, had no standing to represent those minors who were mature or emancipated. *Id.* at 406. The holding, therefore, applies only to those pregnant minors who are dependent or immature.

45. *Id.* at 411. *But see* Note, *H.L. v. Matheson: Where Does the Court Stand on Abortion and Parental Notification?*, 31 AM. U. L. REV. 431, 457 n.207 (1982). The Court "rejected 'safeguarding of the family unit' as a significant state interest sufficient to uphold the parental notification statute in *Danforth*, but deemed 'the preservation of family integrity' as a significant state interest sufficient to uphold the parental notification statute in *Matheson*." *Id.*

46. *Matheson*, 450 U.S. at 411.

47. *Id.* at 412 n.22.

48. *Id.* at 413. Furthermore, state action which encourages childbirth except in urgent circumstances is " 'rationally related to the legitimate governmental objective of protecting potential life.' " *Id.* (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

49. *Id.* at 412. The Court noted that time may be of the essence. *Id.*

The Court distinguished *Matheson* from *Danforth* and *Bellotti II* by holding that, unlike a parental consent statute, a mere parental notification statute does not unduly burden a minor's right to obtain an abortion.[50] Arguably, however, parental notice does burden her right of privacy by revealing the context of a confidential consultation with her physician, effectively cancelling her right to avoid disclosure of a personal decision and potentially limiting the effectuation of her decision.[51]

### C. *Mandatory Waiting Periods*

The Supreme Court addressed a new issue in *City of Akron v. Akron Center for Reproductive Health*[52] when it held unconstitutional a requirement that a woman wait twenty-four hours before obtaining an abortion after giving informed and written consent to the procedure.[53] The Court found that the waiting period was "arbitrary and inflexible" and did not serve to further any legitimate state interest.[54] No evidence had been presented that a waiting period increased the safety of the procedure or contributed to the making of an informed decision.[55] The state, therefore, may not demand that a woman delay the effectuation of her decision when she is fully informed and prepared to proceed with the abortion.[56] Although the statute pertained to minor girls as well as mature adult women, the Court did not address the applicability of the waiting period to minors, even though it acknowledged the "unique status of children under the law" and the "significant interest" the state has in protecting them.[57]

In *Planned Parenthood Association v. Ashcroft*,[58] decided the same day as *Akron*, the Supreme Court assessed the constitutionality of the

50. *Id.* at 411 n.17.

51. *Id.* at 437-38 (Marshall, J., dissenting) (citing Roe v. Wade 410 U.S. 113, 164 (1973); Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977)).

52. 462 U.S. 416 (1983).

53. *Id.* at 449. The Court also held invalid a provision of the statute requiring that a pregnant girl under the age of 15 obtain either written consent of a parent or guardian, or a court order authorizing the abortion. *Id.* at 442. The Court thus reaffirmed *Danforth* and *Bellotti II* and ruled that the city of Akron could not make a blanket determination that *all* minors under the age of 15 are too immature to make the decision or that an abortion would never be in their best interest. *Id.* at 440.

54. *Id.* at 450. However, Justice O'Connor, in her dissent, stated that the waiting period was reasonably related to the state's interest in ensuring that the woman does not make the stressful abortion decision in haste. *Id.* at 474 (O'Connor, J., dissenting).

55. *Id.* at 450.

56. *Id.* at 450-51.

57. *Id.* at 427-28 n.10.

58. 462 U.S. 476 (1983), *aff'g in part, rev'g in part*, 655 F.2d 848 (8th Cir. 1981).

judicial alternative provision of a Missouri parental consent statute and found it valid.[59] Following the *Bellotti II* requirements,[60] the Court found that the statute provided confidential and expeditious proceedings in which the minor could circumvent the parental consent requirement.[61] Furthermore, the decision affirmed the appellate court's holding that a court may only deny a minor's petition "for good cause" if the evidence indicates that she is not mature enough to make the decision for herself.[62] Thus, the Court protected the minor against an "absolute, and possibly arbitrary" veto found impermissible in *Danforth*.[63]

## IV. THE *ZBARAZ* DECISION

In *Hartigan v. Zbaraz*,[64] an equally divided Supreme Court affirmed, in a memorandum decision, the holding of the Seventh Circuit that a twenty-four hour waiting period violates a minor's right to obtain an abortion. According to the Seventh Circuit court, the judicial alternative to parental notification does not sufficiently ensure expeditious and anonymous proceedings for an appeal of the court's decision.[65] The court severed the waiting-period provisions of the Illinois Parental Notice of Abortion Act of 1983 and permanently enjoined their enforcement. The court temporarily enjoined enforcement of the remainder of the Act until the Illinois Supreme Court promulgated rules assuring the confidential and expeditious disposition of the waiver of notice proceedings at trial and on appeal.[66]

### A. *Twenty-four Hour Waiting Period*

The Seventh Circuit Court of Appeals recognized that a parental

59. *Id.* at 493. The Court acknowledged that the relevant legal standards with respect to parental consent requirements were not in dispute since a state's interest in protecting minors could sustain such requirements so long as an alternative was made available to the minor. *Id.* at 490-91. The issue here was simply whether the Missouri statute provided a judicial alternative consistent with the established legal standards. *Id.* at 491-92.

60. *Bellotti II*, 443 U.S. 622, 644 (1979). The proceeding "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.*

61. The statute assured confidentiality by allowing the minor to use only her initials on the petition. *Ashcroft*, 462 U.S. at 491 n.16 (citing MO. REV. STAT. § 188.028.2(1) (Supp. 1982)). The statute also provided a definite time frame for appeal and required that the supreme court of the state expedite appellate review of the case. MO. REV. STAT. § 188.028.2(6) (Supp. 1982).

62. *Ashcroft*, 462 U.S. at 493 (citing *Bellotti II*, 443 U.S. at 643-44, 647-48 (1979)).

63. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

64. 108 S. Ct. 479 (1987), *aff'g per curiam*, 763 F.2d 1532 (7th Cir. 1985).

65. Zbaraz v. Hartigan, 763 F.2d 1532, 1538, 1542, 1544 (7th Cir. 1985), *aff'd per curiam*, 108 S. Ct. 479 (1987).

66. *Id.* at 1545.

notification statute furthers the significant state interest in promoting parental consultation with a minor if she is immature or if an abortion would not be in her best interest.[67] However, the court also noted that a "plethora" of decisions have struck down provisions requiring waiting periods because of the "direct and substantial burden" they place on a woman's fundamental right to have an abortion.[68] Furthermore, the court found that the burden is the same for minors as it is for adults,[69] and because abortion is a fundamental right, the state must prove that the statute is "narrowly drawn to further a compelling interest."[70] The court held that since parental notification is sufficient to further the state objective of promoting parental consultation, the addition of a mandatory waiting period created a statute which was broader than necessary to accomplish the state's goals.[71] Consequently, the court held the provision of the Act which imposed a twenty-four hour waiting period to be unconstitutional.

The court rejected the defendant's argument that the waiting period was not mandatory, and therefore not unconstitutionally burdensome, since the Act provided exceptions by which the minor could avoid the brief delay. Section 7 of the Act permitted the minor to waive the requirement if she was either accompanied to the abortion facility by both of her parents or if she submitted a signed, notarized statement from her parents indicating that they had been notified of her decision.[72] However, the court found that rather than alleviating the burden, the exceptions increased it threefold by adversely affecting not only the minor, but also her parents.[73] Furthermore, section 7 did not provide an exception for those minors whose parents had been notified and approved of her decision, but chose not to exercise either of the options provided for by

67. *Id.* at 1536.

68. *Id.* at 1536-37. The court discussed Women's Medical Center v. Roberts, 530 F. Supp. 1136, 1146 (D.R.I. 1982), which stated that a mandatory waiting period combined with scheduling factors such as doctor availability, work commitments, and sick leave may result in an actual delay of a week or more and could significantly increase the risk and cost of the procedure. *Zbaraz*, 763 F.2d at 1537.

69. *Zbaraz*, 763 F.2d at 1537.

70. *Id.* (quoting Charles v. Carey, 627 F.2d 772, 785 (7th Cir. 1980)). *See also* Roe v. Wade, 410 U.S. 113, 155 (1973).

71. *Zbaraz*, 763 F.2d at 1538.

72. ILL. REV. STAT. ch. 38, ¶ 88-67 (1983). The waiting period could be waived if both parents were notified of the minor's decision and both either accompanied her to the abortion facility or submitted signed notarized statements that they had been notified. *Zbaraz*, 763 F.2d at 1538.

73. *Zbaraz*, 763 F.2d at 1538.

section 7.[74] Section 7, therefore, not only failed to remedy the constitutional infirmity of the waiting period, but was itself invalid for actually increasing the burden.[75]

### B. *Judicial Alternative to Notice*

Although section 5 of the Act provided an adequate framework for the initial waiver of notice hearing, it did not provide a constitutionally sufficient means of appeal.[76] To be sufficient, the procedure must be an "established and practical avenue" which does not "rely solely on generally stated principles of availability, confidentiality, and form."[77] Confidentiality during and after a waiver of notification proceeding "is essential to ensure that a minor will not be deterred from exercising her right to hearing [out of] fear that her parents may be notified."[78] Furthermore, since time may be of the essence, the pregnant minor must be ensured that her case will be heard as quickly as possible. The court stated that the provision was incomplete until the Illinois Supreme Court could promulgate specific rules to ensure a confidential and expeditious waiver hearing and appeal. The constitutionality of the judicial alternative provided for in section 5 would not be determined until that time.[79] The court remanded the case to the district court to determine "the constitutionality of the waiver of notice proceedings when such rules [were] enacted."[80]

## V. ANALYSIS

Although the *Zbaraz* court properly enjoined enforcement of the

74. Once notice to a minor's parents has been effected, "the state cannot require that an abortion be delayed. . . ." *Id.* at 1538-39 (quoting Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1143 (7th Cir. 1983)).

75. *Id.* at 1539.

76. Section 5(c) pertained to the initial hearing and provided that the proceedings "shall be confidential" and that "in no case shall the court fail to rule within 48 hours of the time of application. . . ." ILL. REV. STAT. ch. 38, ¶ 81-65(c) (1983). Section 5(f), however, provided that "[a]n expedited confidential appeal shall be available, as the [Illinois] Supreme Court provides by rule . . . ." and section 5(g) stated that the supreme court should promulgate "regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." *Id.* ¶ 81-65(f)-(g).

77. *Zbaraz*, 763 F.2d at 1540 (quoting American College of Obstetricians v. Thornburgh, 737 F.2d 283, 297 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986)). *See also Bellotti II*, 443 U.S. 622, 644 (1979) (The judicial alternative "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.").

78. *Zbaraz*, 763 F.2d at 1542.

79. *Id.* at 1541.

80. *Id.* at 1545.

Act pending the Illinois Supreme Court's promulgation of rules assuring a confidential and expeditious hearing, it erred in finding the twenty-four hour waiting period unconstitutional as an undue burden on a minor's right to obtain an abortion. The court's errors were threefold. First, the court applied the strict scrutiny test[81] and incorrectly found that the statute was not narrowly tailored to further only the significant state interest of encouraging parental consultation when a waiting period was combined with a notification requirement that furthered that interest.[82] Second, the court failed to give the parents of immature minors an opportunity to exercise their "*constitutional parental right* against undue, adverse interference by the State."[83] Third, the court failed to recognize that a statute requiring parental notification, followed by a twenty-four hour waiting period, imposes a lesser burden upon the immature minor than parental consent statutes previously upheld by the Supreme Court.[84]

### A. *The Statute Withstands Strict Scrutiny*

The Illinois Parental Notice of Abortion Act of 1983 was intended to involve parents in the abortion decision of their immature, unemancipated, minor daughter.[85] The Act did not apply to adult women or emancipated minors. Furthermore, it provided an avenue for an unemancipated minor to bypass the statute's notification requirement by appealing to the court for a waiver of notice.[86] Also exempted from the

81. A statute that infringes upon a fundamental right must be justified by a compelling state interest and be so narrowly drawn that it serves only that legitimate interest. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

82. *Zbaraz*, 763 F.2d at 1538. The court held that a mere notification requirement promotes the state's interest of parental consultation and is not unduly burdensome as long as it provides an exception for mature minors and immature minors whose best interests are served by an abortion. *Id.* at 1536 (citing City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983)).

83. *Id.* at 1549 (Coffey, J., dissenting) (quoting *Bellotti II*, 443 U.S. 622, 639 n.18 (1979)).

84. The Supreme Court has held that the state may implement parental consent statutes so long as it also provides an alternative means by which the minor may obtain authorization to obtain an abortion. *See, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); *Bellotti II*, 443 U.S. 622 (1979).

85. The express legislative purpose of the Act is "to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household." ILL. REV. STAT. ch. 38, ¶ 81-62(a) (1983). *See also supra* note 10 for the definition of "minor" and "emancipated."

86. The minor, appearing in court on her own behalf with a guardian ad litem, may be granted a waiver of notice if she demonstrates that she is well informed enough to make the decision on her own or that parental notification would not be in her best interest. If notice is waived, the 24-hour waiting period is not required. *Id.* ¶ 81-65(b), (d).

waiting period were those minors who either were accompanied to the abortion facility by their parents or submitted notarized statements indicating parental notification.[87] Finally, the Act provided exceptions for minors whose medical condition dictated an immediate emergency abortion.[88] Thus, the waiting period pertained only to those unemancipated minor girls who chose not to exercise the section 7 alternatives to the waiting period and to those minors who were either too immature to make the abortion decision or in whose best interest it would be to involve their parents in the decision. These girls would benefit most from the recognized state interest of "protecting minors against their own immaturity" by promoting parental consultation.[89]

The Supreme Court has held that the constitutional rights of minors should not receive less protection than those of adults.[90] The Court has also held that the difference between abortion statutes which regulate adults and those regulating only minors is that the state may have legitimate interests in protecting minors which would not apply to adults, mature minors, or immature minors whose best interests are contrary to parental involvement in the abortion decision.[91] Because of a minor's inexperience, presumed vulnerability, and inability to make informed and mature decisions, the Supreme Court has consistently upheld statutes that promote parental consultation with an unemancipated minor before she can obtain an abortion.[92] Although a state may regulate the activities of minors to protect them from immediate and future harm, the Court restricts the state by strictly scrutinizing any statute imposing a direct burden on fundamental rights.[93]

The *Zbaraz* court applied the strict scrutiny test and held that the statute was not narrowly tailored to further the significant state interest

87. *Id.* ¶ 81-67(a).

88. *Id.* ¶ 81-66.

89. *Bellotti II*, 443 U.S. 622, 640 (1979). *See also supra* note 85 for the legislative intent of the Act.

90. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (citations omitted).

91. Zbaraz v. Hartigan, 763 F.2d 1532, 1536 (7th Cir. 1985) (citations omitted), *aff'd per curiam*, 108 S. Ct. 479 (1987).

92. Parental participation has been encouraged through notification and consent statutes. *See, e.g.*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 490-91 (1983), *aff'g in part, rev'g in part*, 655 F.2d 848 (8th Cir. 1981); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 439 (1983); H.L. v. Matheson, 450 U.S. 398, 409 (1981); *Bellotti II*, 443 U.S. 622, 640 (1979).

93. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

of parental consultation.[94] The court stated that parental notification was sufficient to promote the goal of parental consultation; therefore, the addition of a mandatory waiting period was unnecessary and overbroad.[95] Assuming the court applied the appropriate level of judicial review,[96] it failed to recognize that mere notification, which could be accomplished by the physician over the telephone just prior to performing the abortion,[97] does not serve to promote the state interest at all. There is no assurance that the immature minor will receive any form of counseling or advice in making an extremely important and irreversible decision. Only the implementation of a waiting period can increase the potential of assuring the state that its compelling interests are protected.

If the Supreme Court persists in upholding parental notification statutes,[98] thereby denying the minor the right to confidentially exercise her fundamental right to choose to terminate a pregnancy, it must at least ensure that some benefit be derived from it. Since parental consultation is the state's desired objective, the Court must allow the state to implement the least restrictive means necessary to accomplish the goal. No state interest in parental consultation can possibly be served by telephone notice to the minor's parents just prior to the abortion. But parental notice accompanied by a brief waiting period significantly furthers the state interest by providing an opportunity for parental consultation, and does so in a narrowly tailored manner by requiring only a brief delay rather than parental consent.

The Seventh Circuit Court of Appeals, in *Zbaraz*, relied heavily on *City of Akron v. Akron Center for Reproductive Health*,[99] a case in which the Supreme Court struck down an ordinance imposing a twenty-four

94. *Zbaraz*, 763 F.2d at 1538.

95. *Id.* at 1538-39.

96. The courts have been inconsistent in the level of scrutiny applied to statutes regulating minors. The *Zbaraz* court stated that strict scrutiny should be applied since it was a fundamental right being burdened. *Id.* at 1536-37. However, the court acknowledged that a minor's rights are subject to greater state control than those of adults and wrote in terms of "significant" state interests to be considered, rather than "compelling" interests. *Id. See also Matheson*, 450 U.S. at 411-13 (parental notice serves "significant state interest" of parental consultation and is "narrowly drawn to protect only those interests."); Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (examined statute for "significant state interest . . . not present in the case of an adult."). *Compare with* Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977) ("lesser scrutiny" than the compelling interest test is appropriate for minor's privacy interests).

97. "Actual notice" is defined as "giving of notice directly, in person or by telephone." ILL. REV. STAT. ch. 38, ¶ 81-63(c) (1983).

98. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398 (1981); Note, *Zbaraz v. Hartigan: Mandatory Twenty-Four Hour Waiting Period After Parental Notification Unconstitutionally Burdens a Minor's Abortion Decision*, 19 J. MARSHALL L. REV. 1071, 1079 n.57 (1969).

99. 462 U.S. 416 (1983).

hour waiting period on a woman who had given informed, written consent to the abortion. The state has an interest in ensuring that all women make informed abortion decisions, but the Court ruled that the state failed to demonstrate that the waiting period furthered this interest; therefore, the waiting period was an impermissible burden on the woman's right.[100] The Court stated that if, after counseling, a woman is prepared to give written consent and proceed with the abortion, the state may not delay the effectuation of her decision.[101] Although the *Akron* Court stated that "in view of the unique status of children under the law," the state may have an interest in protecting children that is not present when the state regulates adults,[102] the applicability of the waiting period to minors was not addressed. Since minors have repeatedly been recognized as unable to make mature, informed choices about serious matters,[103] a waiting period would logically further the state's desire to ensure that the minor makes an informed abortion decision.

Unlike the state's interest in *Akron*,[104] the interest in *Zbaraz* was to protect unemancipated, pregnant minors from their own immaturity. Thus, the two cases can be distinguished on the basis that adult women are presumed capable of making informed, mature decisions, while immature minors are presumed incapable of doing the same. Yet the *Zbaraz* court failed to make the critical distinction between a waiting period held unconstitutional because it applied to all women (including mature adult women) and one which applied exclusively to immature, unemancipated minors. Although the *Zbaraz* court recognized that *Akron* may not apply to minors and that the Supreme Court has not yet specifically addressed a similar requirement when applied only to minors,[105] it extended the *Akron* holding because the court found it "apparent" that the Supreme Court's prohibition also extends to statutes regulating minors only.[106] However, all but one of the cases cited by the *Zbaraz* majority in support of its decision involve statutes imposing a waiting period on mature adult women, not on immature minors

100. *Id.* at 450. There was no evidence that the abortion would be performed more safely or that a woman's decision would be more informed after 24 hours. *Id.*

101. *Id.* at 450-51.

102. *Id.* at 427-28 n.10 (citations omitted).

103. *See generally Bellotti II*, 443 U.S. 622, 633-34 (1979).

104. The state interest in *Akron* was to ensure that the woman makes an informed decision to have an abortion. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450 (1983).

105. Zbaraz v. Hartigan, 763 F.2d 1532, 1535 (7th Cir. 1985), *aff'd per curiam*, 108 S. Ct. 479 (1987).

106. *Id.* at 1535-36.

alone.[107]

*Zbaraz* can also be distinguished from *H.L. v. Matheson*,[108] which upheld a parental notification statute that promoted the state's interest in encouraging parental consultation without unduly burdening a minor's right to have an abortion.[109] The statute in *Matheson* did not include a mandatory waiting period, and the Court refused to require a state to "fine-tune its statutes so as to encourage or facilitate abortions."[110] Rather, the Court determined that the statute was sufficient to protect minors by "*enhancing the potential* for parental consultation."[111] In contrast, the state in *Zbaraz* desired to give substance to its parental notification requirement and attempted to "fine-tune" its statute in order to ensure that parental consultation can become a reality—not merely enhance the potential for it. Yet the majority prohibited the state from implementing the most effective and least burdensome means available to achieve its goal.

### B. *The Court Ignores Parental Rights*

The court's holding ignores the third objective of the Illinois Act: to protect the right of parents to rear children who are members of their household.[112] The Supreme Court has stated that constitutional interpretation recognizes that parental authority within the family to direct the rearing of their children is "basic to the structure of our society."[113] This right is closely related to the state's interest in protecting minors, and both interests are commonly furthered by requiring parental consent for the minor's involvement in important decisions.[114] One important justification for the state's deference to parents is the parents' right and duty to instill in their child the political, ethical, or religious beliefs which the state cannot do in a society "committed to the ideal of individual liberty and freedom of choice."[115]

Since abortion is a fundamental right, the state must act with sensitivity in legislating parental involvement. The Court has already held

107. *Id.* at 1554 (Coffey, J., dissenting).
108. 450 U.S. 398 (1981).
109. *Id.* at 413.
110. *Id.*
111. *Id.* at 412 (emphasis added).
112. *See supra* note 85.
113. Zbaraz v. Hartigan, 763 F.2d 1532, 1549 (7th Cir. 1985) (Coffey, J., dissenting) (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968), *aff'd per curiam*, 108 S. Ct. 479 (1987)).
114. *Bellotti II*, 443 U.S. 622, 637 (1979).
115. *Id.* at 637-38.

that a parental notification requirement does not unduly burden the rights of an immature minor or one whose best interests are not served by an abortion.[116] But mere notification without a brief waiting period does not assure parents that their rights are protected. They must be given an opportunity to exercise their constitutional right to counsel and give emotional support to their immature minor daughter if they so choose. This can only be accomplished if the minor is required to wait twenty-four hours after the parents have been notified.[117]

Section 7 of the Act serves to promote the state's compelling interest in protecting the rights of parents to rear their children. This provision exempts the pregnant minor from the waiting period if she is either accompanied by both of her parents or submits a signed, notarized statement in which the parents have acknowledged the abortion decision. In either case, the parents' actions imply that the girl has informed them of her plans, that they have had an opportunity to discuss her decision with her, and that they agree to assist her in effectuating her decision. Thus, section 7 serves to protect the immature minor from making an uninformed choice while also advancing the parents' right to participate in their minor daughter's abortion decision.

### C. *A Waiting Period is Less Burdensome than Consent*

Finally, the court failed to recognize that a twenty-four hour waiting period after parental notification imposes a lesser burden upon the minor's right than the parental consent statutes which the Supreme Court has consistently upheld. In *Planned Parenthood Association v. Ashcroft*,[118] the Court upheld a parental consent statute as being justified by important state and parental interests.[119] Yet, in doing so, the Court imposed "a permanent impediment"[120] to a minor's abortion right unless she exercised her right to appeal to the court for alternative authorization

116. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 413 (1981).

117. It is important to recognize that parental notification followed by a brief waiting period is not tantamount to parental consent or parental veto. The minor may still effectuate her abortion decision over her parents' objections; she merely must wait one day to do so. However, if the parents discuss the minor's decision with her, she will potentially act with a greater understanding of the consequences of the procedure.

118. 462 U.S. 476 (1983).

119. *Id.* at 493. The Court stated that "[a] State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial," as long as alternative procedures are available to allow her to avoid parental veto. *Id.* at 490-91.

120. Brief for Appellants at 49, Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) (No. 85-673).

and prevailed in her attempt to circumvent the required parental consent. The minor might possibly never obtain an abortion. Thus, a parental consent requirement imposes a very direct and substantial burden upon a minor's constitutional rights; yet the Court has found that this burden is permissible. In contrast, a statute requiring mere parental notification followed by a brief waiting period does not impose such an onerous burden. The minor need not obtain permission, so she may still effectuate her decision to have an abortion over her parents' objections. She is required to wait one day after notification, but she is not required to surrender her right to obtain an abortion. The Court's decision is, therefore, inconsistent with *Ashcroft*.

## VI. JUSTICE KENNEDY'S POSSIBLE IMPACT ON FUTURE DECISIONS

The significance of the *Zbaraz* decision lies in the fact that an equally divided Supreme Court affirmed the decision of the Court of Appeals. Since that decision, the United States Senate confirmed the appointment of Anthony Kennedy to fill the Supreme Court seat vacated by Justice Lewis Powell, Jr.[121] Although Justice Kennedy wrote more than 430 opinions during his twelve years as a Ninth Circuit judge and underwent extensive questioning by the Senate Committee on the Judiciary, his stance on such issues as civil rights, women's rights, and the right of privacy is still somewhat uncertain.[122] Because Justice Kennedy would provide the "swing" vote in a case similar to *Zbaraz*, an understanding of his judicial philosophy is important in order to predict the impact of his appointment.[123]

### A. *Judicial Philosophy*

Justice Kennedy agrees that a description of his judicial philosophy as "conservative" and "unlikely to accept doctrines which substantially expand the role of the courts" is "probably apt as a general rule."[124]

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121. *See supra* note 8.

122. Williams, *The Opinions of Anthony Kennedy, No Time for Ideology*, A.B.A. J., March 1, 1988, at 56.

123. On August 8, 1988, the Eighth Circuit Court of Appeals upheld as constitutional a Minnesota statute requiring that a minor seeking an abortion give 48-hours notice to her parents. Hodgson v. State, 853 F.2d 1452 (8th Cir. 1988). The decision followed an en banc rehearing of the court's previous holding that the statute was unconstitutional. Hodgson v. State, 827 F.2d 1191 (8th Cir.), *reh'g granted and opinion vacated*, 835 F.2d 1545 (8th Cir. 1987). Although petition for certiorari has not yet been filed, *Hodgson* indicates the existence of cases similar to *Zbaraz* which may eventually reach the Supreme Court.

124. *Change, But Not for the Sake of Change*, Legal Times, Dec. 7, 1987, at 21, col. 1. Judge

Although he acknowledges the necessity of change and continued constitutional interpretation, he stresses that the Constitution must be considered in light of the framers' intent, legal precedent, and the traditions and values of our society.[125] Our understanding of the Constitution changes with each generation's new insights and perspectives, and Justice Kennedy has stated that he believes that the framers intended the Constitution to create a better society through continued interpretation and change.[126]

Judge Kennedy's Ninth Circuit record has been described as both adhering to and ignoring judicial precedent. His approach in criminal law has been characterized as using judicial restraint and "adher[ing] strictly to Supreme Court and 9th Circuit precedent, even where the application of precedent leads to possibly unsatisfactory results."[127] However, he has also been criticized for ignoring Supreme Court precedent and standards in his holdings regarding the civil rights of women and minorities under the equal protection clause of the fourteenth amendment and Title IV of the Civil Rights Act of 1964.[128] Although Kennedy has stated that stare decisis ensures "impartiality" and "stability" of the law,[129] Justice Kennedy voted with a 5-4 majority[130] to hear reargument of *Patterson v. McLean Credit Union*[131] to determine whether *Runyan v. McCrary*,[132] a well-established civil rights case, should be reconsidered.

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Kennedy discussed his views on constitutional interpretation in a February 1984 speech given to the Sacramento Rotary Club.

125. *Id.*

126. *Judge Kennedy: 'Wise Restraints Make Us Free,'* Legal Times, Nov. 16, 1987, at 14, col. 1. Judge Kennedy's remarks were made as a panel member discussing the role of courts in constitutional interpretation at an August 1987 conference of Ninth Circuit judges.

127. Green, *Justice Kennedy Might Not Meet Expectations of Administration*, NAT'L L. J., Dec. 21, 1987 at 20, col. 2.

128. *See generally* THE NATION INSTITUTE, JUDGE KENNEDY'S RECORD, THE SUPREME COURT WATCH PROJECT'S ANALYSIS OF THE JUDICIAL OPINIONS OF JUDGE ANTHONY M. KENNEDY (A. Feinberg ed. 1987); *Statement of Federation of Women Lawyers' Judicial Screening Panel on the Nomination of Anthony M. Kennedy* before the Committee on the Judiciary, United States Senate, 100th Cong., 2d Sess. (1988); *Statement of Susan Deller Ross, Professor of Law, Georgetown University Law Center on Behalf of the NOW Legal Defense and Education Fund on the Nomination of Judge Anthony M. Kennedy to the Supreme Court of the United States* before the Committee on the Judiciary, United States Senate, 100th Cong., 2d Sess. (1987).

129. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, EXEC. REP. NO. 100-13, 100th Cong., 2d Sess. 13 (1988) [hereinafter NOMINATION].

130. Justice Kennedy joined in the *per curiam* opinion with Justices O'Connor, Scalia, White, and Rehnquist.

131. 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987), *restored to calender for reargument*, 108 S. Ct. 1419 (1988) (claim of workplace harassment, unlike claims of discriminatory hiring, firing, or promotion, is not actionable under 42 U.S.C. § 1981).

132. 427 U.S. 160 (1976). The 7-2 Court held in *Runyan* that it is "well established" that 42 U.S.C. § 1981 "prohibits racial discrimination in the making and enforcement of private contracts,"

Justice Blackmun, in his dissent, stated that reconsidering the *Runyan* decision "is neither restrained, nor judicious, nor consistent with the accepted doctrine of stare decisis."[133] Justice Kennedy's vote in *Patterson* apparently undermines his professed views of stare decisis.

The Senate Committee on the Judiciary determined upon review of Judge Kennedy's judicial record that he "adheres to" the tenets of judicial restraint which dictate that judges decide only the issues of a case which are vital to its resolution.[134] His general approach is to focus specifically on those vital issues and, where possible, to avoid constitutional questions.[135] According to Kennedy, the proper role of a judge is to interpret the law by applying the principles established under the Constitution and ignoring personal philosophies regarding desirable or "just" social policies.[136]

Constitutional law binds the courts in announcing constitutional doctrine.[137] Thus, the courts must differentiate between the essential rights that should exist in a just society and those essential rights that exist under our constitutional system.[138] Only those fundamental rights guaranteed by the Constitution can be enforced; the rights or policies that are merely desirable in a just society should not be addressed. Thus, at the core of the constitutional interpretation controversy is the question of whether rights must be enumerated in order to be afforded protection. Therefore, understanding Justice Kennedy's views on unenumerated rights is imperative.

### B. *Right of Privacy*

Justice Kennedy believes that fundamental rights exist which the "liberty clause" of the Constitution serves to protect from governmental interference, and that the rights of the liberty clause need not be specifically enumerated for the people to enjoy that protection.[139] The role of the courts is to identify the "waivering line" between the rights of the

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thereby determining that § 1981 prohibits the exclusion from private schools of qualified children solely because they are black. *Id.* at 168.

133. *Patterson*, 108 S. Ct. at 1421 (Blackmun, J., dissenting).

134. NOMINATION, *supra* note 129, at 11, 52.

135. *Id.* at 52.

136. *Id.*

137. Address by Judge Anthony M. Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint, Canadian Institute for Advanced Legal Studies, The Stanford Lectures, at 3 (July 24 - Aug. 1, 1986).

138. *Id.* at 13.

139. NOMINATION, *supra* note 129, at 17-18. Judge Kennedy was referring to the due process clause of the fifth and fourteenth amendments.

individual and the state in order to demarcate the "protected zone of liberty."[140]

Although Kennedy includes the value of privacy within the zone of liberty protected by the substantive component of the due process clause, he believes the courts are still in an evolutionary stage of defining the extent of that right.[141] In determining the extent of constitutional protection for private consensual activities, Kennedy has suggested several factors to consider and balance against the interests of the state. The factors include such subjective norms as "the essentiality of the right to human dignity, . . . the harm . . . [and] anguish to the person, the inability of the person to manifest his or her own personality, . . . [and] the inability of a person not to reach his or her own potential."[142] These factors must be balanced against the interests asserted by the state. Kennedy contends that state interests include the deference and respect the court owes to the legislative process which is itself "an interpreter of the Constitution."[143]

Although Kennedy never addressed the right of privacy in the abortion context as a Ninth Circuit judge, he did address the right of privacy and its relation to private, consensual homosexual conduct. In *Beller v. Middendorf*,[144] Judge Kennedy upheld as constitutional a Navy regulation which required the discharge of any member, regardless of the individual's fitness for service, for engaging in homosexual activity.[145] The *Beller* holding was characteristically narrow, as Kennedy avoided the crucial question of whether private, consensual, homosexual conduct is a fundamental right and instead, addressed the case from a substantive due process approach rather than from an equal protection approach.[146] Kennedy acknowledged that there is "substantial academic comment" which argues that the personal decision to engage in homosexual conduct may be entitled to recognition as a fundamental right and should be protected "as an aspect of the right of privacy."[147] Yet he rejected the fundamental rights analysis—which he recognized was firmly established by

140. *Id.*
141. *Id.* at 21.
142. *Id.* at 22.
143. *Id.*
144. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).
145. *Id.* at 812. Kennedy, however, attempted to distance himself from the harshness of the holding by stating that upholding the regulations "is distinct from a statement that they are wise." *Id.*
146. *Id.* at 807. Kennedy stated that the appeals were not presented as impacting a suspect or quasi-suspect class; therefore, equal protection analysis did not apply. *Id.*
147. *Id.* at 809.

*Roe v. Wade*[148]—in favor of a case-by-case balancing approach for substantive due process scrutiny.[149]

Judge Kennedy conceded that private, consensual, homosexual conduct should be granted a "heightened solicitude,"[150] yet he uncritically accepted the interests asserted by the Navy for implementing and enforcing its blanket rule against homosexual activity by service personnel.[151] In essence, Kennedy gave little or no scrutiny to the Navy regulation, relying instead upon the philosophy that the special needs and demands of the military may infringe upon rights or activities that "might" be protected in another context.[152] Thus, *Beller* supports Justice Kennedy's advocacy of deference to the legislative process (albeit Navy regulation in this case) and his adherence to the demands of the tenets of judicial restraint.

Although an analysis of *Beller*, standing alone, cannot predict Justice Kennedy's stance on abortion and the issues posed in *Hartigan v. Zbaraz*, his dissent in *United States v. Penn*[153] adds substance to a *Zbaraz* prediction. Judge Kennedy emphatically asserted that a police officer's bribe of a child "*who has not [yet] reached the age of reason*" was a severe intrusion into the intimate mother-child relationship.[154] Although Kennedy did not explicitly mention the right of privacy, he relied in part on *Moore v. City of East Cleveland*[155] and *Pierce v. Society*

148. 410 U.S. 113 (1973).

149. Beller v. Middendorf, 632 F.2d 788, 807-08 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

150. *Id.* at 810. Kennedy stated that the case lay somewhere between the compelling state interest test of *Roe v. Wade*, 410 U.S. 113 (1973), used for matters at the "core of interests which deserve due process protection" and the test requiring a "rational relation to a legitimate government interest" which usually serves to uphold the regulation. *Beller*, 632 F.2d at 808-09.

151. Miller v. Rumsfeld, 647 F.2d 80, 90 (9th Cir.) (Norris, J., dissenting from denial of rehearing en banc), *cert. denied*, 452 U.S. 905 (1981).

152. *Beller*, 632 F.2d at 811-12.

153. 647 F.2d 876 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980). Police officers, searching for heroin, entered a house with a valid search warrant. When they were unable to find any heroin, one of the officers offered the owner's five-year-old son five dollars if he would show them where the "little balloons" were hidden. The child did, and the officers discovered the heroin. The majority of the Ninth Circuit court found that the bribe did not violate the fifth amendment due process clause.

154. *Id.* at 888 (Kennedy, J., dissenting) (emphasis added).

155. 431 U.S. 494 (1977). The Court struck down an ordinance limiting housing occupancy to members of a single family, thereby protecting the sanctity of the family and family choices.

*of Sisters*,[156] and maintained that the parent-child union has a "fundamental place" in our culture.[157] Thus, as an "essential liberty," the parent-child relationship must be protected from disruption.[158]

### C. *Abortion Waiting-Period Statutes*

After considering Justice Kennedy's approach to judicial review, his beliefs concerning fundamental rights, and the importance he places on the parent-child union, one might conclude that Justice Kennedy would join the dissenters in *Hartigan v. Zbaraz* and declare the twenty-four hour waiting period constitutional. Of the factors considered, the most compelling is Justice Kennedy's fervent belief in the parent-child union as a fundamental relationship to be protected against state interference. The articulated goals of the Illinois Parental Notice of Abortion Act of 1983 include protecting the minor from her own immaturity and protecting the rights of parents to rear the children who are in their household.[159] These goals are in direct accord with Justice Kennedy's views of the family, and he would almost certainly be responsive to a statute which ensured that a parent's rights and an immature, dependent minor's health and well-being are protected. Justice Kennedy would likely advocate that the sanctity of the parent-child union can best be preserved and encouraged by requiring that the physician give the parents notice twenty-four hours before performing an abortion on their immature, minor pregnant daughter—not merely telephone notice five minutes prior to the procedure as the statute would otherwise permit. Thus, the state's interest in enhancing parental consultation, the parents' right to direct the rearing of their child, and the minor's right to obtain an abortion are balanced.

Justice Kennedy's judicial philosophy also suggests that he would find the waiting period constitutional. Although his respect for judicial precedent is arguable,[160] he would likely adhere to Supreme Court precedent when it preserves a fundamental right. The Court recognizes the

156. 268 U.S. 510 (1925). The Court held that the right of privacy encompasses the parents' right to direct the rearing of their children. The Court thus struck an ordinance requiring parents to send their children to public school.

157. *Penn*, 647 F.2d at 888 (Kennedy, J., dissenting).

158. *Id.* at 889.

159. *See supra* note 85.

160. *See supra* notes 127-28 and accompanying text.

important interest parents have in consulting with their child in the abortion decision, and has furthered that interest by upholding parental consent and notification statutes.[161] Justice Kennedy might well follow this precedent and interpret a twenty-four hour waiting period as furthering the state interest by ensuring that the opportunity for consultation is available. However, to do so would seem to require a rejection of the Court's holding that a waiting period is unconstitutional.[162] This can be avoided by arguing that previous holdings were in response to statutes which pertained not only to minors, but also to adult women who would not benefit from waiting twenty-four hours after making a mature and informed decision.[163] Therefore, the statutes were unconstitutional as a burden upon a woman's abortion right, and the Court struck down the statutes without considering their applicability to minors. Until *Zbaraz*, the Supreme Court had not addressed a statute requiring a waiting period for minors only. Thus, Kennedy could uphold the twenty-four hour waiting period without rejecting Supreme Court precedent.

Justice Kennedy's adherence to judicial restraint suggests that he would address only the vital issue of *Zbaraz*: whether the twenty-four hour waiting period is constitutional. Thus, he would perhaps avoid any consideration or discussion of whether there is a protected right to obtain an abortion or whether a minor's right of privacy precludes the validity of a parental notification requirement. Justice Kennedy would likely vote to uphold the Act, leaving the underlying issues for future consideration as they arise. Furthermore, his deference to the legislature as an interpreter of the Constitution would allow him to consider the valid legislative intent behind the Act, and, finding it in accord with his own belief in protecting the sanctity of the parent-child union, uphold the twenty-four hour waiting period.

## VII. CONCLUSION

The *Zbaraz v. Hartigan* court failed to recognize that its holding not only imposed a burden upon a minor's right to privacy by upholding a parental consent requirement, but also denied the minor and her parents the opportunity to derive any benefit from the imposition by striking the

161. *See, e.g., Bellotti II*, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981).

162. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

163. Zbaraz v. Hartigan, 763 F.2d 1532, 1554 (7th Cir. 1985) (Coffey, J., dissenting), *aff'd per curiam*, 108 S. Ct. 479 (1987).

waiting-period provision. That the court would, on the one hand, support a requirement which would invade a minor's right of privacy by requiring that her parents be notified of her abortion decision, and on the other hand fail to uphold the only requirement that could most narrowly further the state interest in protecting its immature minors, as well as the parents' rights, seems incongruous. The twenty-four hour waiting period does not become a veto of the minor's decision, since the girl need not obtain parental consent. She need merely wait one additional day before effectuating her decision.

Unfortunately, the Supreme Court issued only a memorandum opinion in affirming the Seventh Circuit decision in *Zbaraz*. The opinion indicates neither the reasoning used to reach the decision nor the composition of the affirming members of the Court. However, Justice Kennedy would probably join the dissenters of the Court and uphold the statute in *Zbaraz*. His fervent belief in the sanctity of the parent-child union indicates that he would advocate the enhanced parental consultation afforded by a brief waiting period. Furthermore, the legitimate legislative goals of the Act would enable him to give proper deference to the legislative process. Thus, Justice Kennedy's vote would uphold a constitutionally fit statute requiring that an immature, dependent minor seeking an abortion wait twenty-four hours after parental notification of her decision.

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